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No. 85-307

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

Estate of NELSON A. ROCKEFELLER, Deceased, LAURANCE S. ROCKEFELLER, J. RICHARDSON DILWORTH and DONAL C. O'BRIEN, JR., Executors, and MARGARETTA F. ROCKEFELLER,

Petitioners,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR PETITIONERS

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The Commissioner does not deny that this case involves fundamental questions of far-reaching significance (Pet. 6-8). He argues that the case was correctly decided (Brief in Opposition at 4-6), and that it is unnecessary to consider whether the decision below is consistent with the mandate of Congress in I.R.C. § 7701(a)(26) and the teaching of this Court in *McDonald* v. *Commissioner*, 323 U.S. 57 (1944). (Brief in Opposition at 7.)

ARGUMENT

1. The decision below is said to be correct, first, because of the eight-month hiatus between Mr. Rockefeller's service as Governor and his nomination as Vice President. The Commissioner seizes upon a novel theory announced by the Court below: that a brief hiatus in a taxpayer's long-standing career,

followed immediately by a resumption of that career, terminates the taxpayer's trade or business and deprives him of the customary deduction for expenses incurred in securing the new position, unless he makes an affirmative showing "that during the hiatus he intended to resume the same trade or business." (Pet. App. 14; Brief in Opposition at 5.)

This has never been the law. The authorities cited for this proposition (Brief in Opposition at 6) do not support it. Such a showing is needed when a taxpayer leaves his trade or business "for a prolonged period." *Sherman* v. *Commissioner*, 36 T.C.M. (CCH) 1191, 1193 (1977) (citing cases where the hiatus lasted four or more years). But as the Commissioner himself has stated, so long as no such "substantial lack of continuity occurred between the time of the past employment and the seeking of the new employment," the taxpayer's trade or business during the hiatus "would consist of the services previously performed for his past employer." Rev. Rul. 75-120, 1975-1 C.B. 55, 56; *see also* Pet. App. 14. Thus, under the Commissioner's own ruling, Mr. Rockefeller's eight-month period of volunteer service on two national commissions, which kept him visible and available for the opportunity that soon came along to continue his life-long career as an executive in state and federal government, did not terminate his trade or business of being a governmental executive.

The decision below is also said to be correct because the positions of chief executive of a state and vice-chief-executive of the country are claimed to be different trades or businesses. But this conclusion can only be reached by applying different standards to officers in the public and private sectors. Under *Primuth* v. *Commissioner*, 54 T.C. 374, 379 (1970); *acq.*, 1972-2 C.B. 2, different executive positions in the corporate sphere are within the same "trade or business of being a corporate executive," whereas under the Tax Court ruling affirmed by the Court below, different positions as a governmental executive are regarded as different trades or businesses by definition. This misreading of the pertinent definitional section of the Internal Revenue Code—Section 7701(a)(26)—is discriminatory and contrary to the intent of Congress.

2. The Commissioner argues that there is no need to correct this misreading of the Code, and no need to remedy the conflict between the decision below and the principle of equal treatment for public and private employees endorsed by this Court in *McDonald* v. *Commissioner, supra* (Pet. 13), because "[t]he court of appeals did not rely either on *McDonald* or on Section 7701(a)(26)." (Brief in Opposition at 7.) But this disregard by the Court below of the controlling statute and the pertinent ruling of this Court is precisely the error that requires review and remedy by this Court.

CONCLUSION

The decision below is incorrect. In view of the importance and widespread impact of that decision (Pet. 6-8), and its inconsistency with the intent of Congress (Pet. 8-12) and with this Court's opinion in *McDonald* (Pet. 12-14), certiorari should be granted.

Respectfully submitted,

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